A **DAYANG RAIHAN PG HJ AHMAD RAFFAE**

v.

MALAYSIA BRITISH ASSURANCE BHD

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[SUIT NO: K1240-1987]
23 AUGUST 2011

C ***INSURANCE:*** *Fire insurance - Claim on policy - Whether plaintiff suffered total loss or damage - Whether house completely burnt and unfit for human habitation - Whether defendant liable to pay plaintiff insured sum of RM600,000 - Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd*

D The plaintiff was the owner of a detached double storey bungalow built on Lot 39, Luyang Phase 8, Kota Kinabalu ('the house'). By a policy of insurance issued on 4 October 1985, the defendant in consideration of the annual premium of RM750 paid to them by the plaintiff, insured against damage by fire to the house for an E insured sum of RM600,000. On 18 September 1986, the house was destroyed by fire. The Fire Services Department Report ('P3') stated that when the firemen arrived at the place of incident, the house was "hampir keseluruhan rumah tersebut dijilat api". The defendant disputed liability but offered to pay the plaintiff a F settlement sum of RM53,711.52 for the loss and damage. Hence, the plaintiff filed this suit. The issue that arose was whether the plaintiff had suffered total loss or damage to the house as to entitle her to be paid the insured sum of RM600,000.

G **Held (allowing plaintiff's claim):**

(1) It was not the defendant's pleaded case that the fire that destroyed the house originated by an excepted cause. Therefore, on the authority of *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd*, the defendant was liable to pay to H the plaintiff the insured sum of RM600,000. (para 8)

(2) There was evidence that the house had suffered total loss. P3 stated that the house could not be saved, and the police I report corroborated the fact that the house was completely destroyed in the fire. The defendant, on the other hand, relied on the evidence of DW3 to establish that the destruction

caused by the fire did not amount to total loss and that the house could be repaired. DW3's assessment was obviously based on the fact that the concrete frame and brick walls of the house were still intact and that the building was still standing. The basis of his assessment was fundamentally flawed as it was not necessary that a building must be razed to the ground or burnt to ashes before it could be said to be suffering from total loss. (paras 9 & 11)

(3) In the context of destruction by fire and in the absence of definition in the insurance policy, "total loss" means that the house ceased to exist as a house. Its character had changed to that of another and different character. A completely burnt house could not properly be called a house. The plaintiff's evidence that the house was completely burnt and had become unfit for human habitation was accepted. The defendant failed to produce any evidence in rebuttal. (para 12)

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

For the plaintiff - Sugumar Balakrishnan; M/s Sugumar & Co
For the defendant - Datin Sa'adah A Aziz; M/s Lee & Aziz

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli J:

[1] The following facts are not in dispute. The plaintiff was the owner of a detached double storey bungalow built on Lot 39, Taman Kinabalu, Luyang Phase 8, Kota Kinabalu. By a policy of insurance issued by the defendant on 4 October 1985 the defendant, in consideration of the annual premium of RM750 paid to them by the plaintiff, insured against damage by fire to the said house for the insured sum of RM600,000. The insurance policy was valid from 24 September 1985 through to 24 September 1986.

[2] On 18 September 1986 the said house was destroyed by fire. At para. 4 of the certified true copy of the Fire Services Department Report dated 24 September 1986 (P3) it is stated

that when the firemen arrived at the place of incident the house was "hampir keseluruhan rumah tersebut dijilat api". The defendant disputed liability but offered to pay the plaintiff a settlement sum of RM53,711.52 for the loss and damage. The plaintiff would not have any of that, hence the filing of this suit.

[3] In my view liability is not in issue. The sole issue is whether the plaintiff has suffered total loss or damage to the house as to entitle her to be paid the insured sum of RM600,000. On the question of liability the starting point is the document at p. 36 of encl. 39. This is a letter dated 23 April 1987 written by the defendant and addressed to the plaintiff. The letter reads:

> Dayang Raihan bte Tun Hj. Ahmad Raffae,
> Lot 43, Raisul Villa, Phase IV
> Taman Friendly, Luyang
> 88100 Kota Kinabalu.
>
> Dear Madam,
>
> **Re: Our Claim No: FF11KK04503**
> **Policy Number: 81S002815**
> **Fire Loss On: 18th September 1986**
> **At: Lot 39, Taman Kinabalu, Luyang, Kota Kinabalu.**
>
> The above Fire Claim refers.
>
> On going through the circumstances of the loss, we are agreeable to offer settlement at $53,711.52 as adjusted and recommended by our Adjuster.
>
> Kindly have the attached Claims Discharge Vouchers duly signed and returned to us to enable us to effect payment.
>
> Your co-operation is appreciated.
>
> Yours faithfully,
>
> For Malaysia British Assurance Berhad
>
> Sgd.
> Alex Cheong
> Branch Manager

[4] The author of this letter is Cheong Yuen Fatt (DW1). He is now the Regional Manager of the defendant for Sabah. He was asked in cross examination if the defendant is bound by this letter. His answer was an unequivocal "yes". The cross examination then proceeded as follows:

Q: In essence am I correct to say that the Defendant does not dispute liability under the policy of insurance in the present case? A

A: Yes it is correct.

Q: Am I also correct that the only issue as far as the Defendant is concerned is the quantum of damages the Defendant is liable under the policy? B

A: Yes it is correct.

[5] The question is whether this is an admission of liability on the part of the defendant, bearing in mind DW1's position in the defendant company. I take the view that it is and consequently the defendant's pleaded defence in so far as it relates to liability must fail and judgment ought to be entered against the defendant on liability. The operative part of defendant's covenant in the insurance policy is as follows: C D

> ... the Company will pay to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof. E
>
> PROVIDED THAT the liability of the Company shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured hereby or such other sum or sums as may be substituted therefore by endorsement hereon or attached hereto, signed for and on behalf of the Company. F

[6] It is an undisputed fact that the insured sum is RM600,000 which is the sum claimed by the plaintiff in this action. In cross examination DW1 was asked which option did the defendant choose and he answered: G

Q: We elected second option ie, pay the amount of such damage.

[7] Is the defendant liable to pay the insured sum of RM600,000? In *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1 it was held by the Federal Court that if the house is burnt, and the loss is in fact caused by fire, the insurer is liable for the insured sum unless the insurer succeeds H I

in establishing that the fire originated by an excepted cause and the burden of proof lies on the insurer to establish that the fire originated by an excepted cause.

[8] In the present case it is not the defendant's pleaded case that the fire that destroyed the plaintiff's house originated by an excepted cause. Therefore, on the authority of *Asean Securities Paper Mills Sdn Bhd, supra* the defendant is liable to pay to the plaintiff the insured sum of RM600,000. The question is whether the house suffered total loss as a result of the fire.

[9] There is evidence that the house suffered total loss. The plaintiff relies on the Fire Services Department Report (P3) which states that the house could not be saved, indicating that the house suffered total loss. The report also states that no part of the insured property was saved in the fire. The police report (encl. 39 p. 33) which is an agreed document corroborates the fact that the house was completely destroyed in the fire. The defendant on the other hand is relying on the evidence of Joseph Soon @ Soon Yow Loong (DW3) to establish that the destruction caused by the fire did not amount to total loss and that the house could be repaired.

[10] I must say with due respect to DW3 that I do not consider his assessment to be reliable. He only had STPM Form 6 qualification notwithstanding his 27 years experience working with adjusters at the time of giving evidence. In 1986, he only had two years experience as an adjuster. I do not think he is more competent than the Fire Services Department to determine if the house was totally destroyed by the fire.

[11] DW3's assessment is obviously based on the fact that the concrete frame and brick walls of the house were still intact and that the building was still standing. In my view the basis of his assessment is fundamentally flawed as it is not necessary that a building must be razed to the ground or burnt to ashes before it can be said to be suffering from total loss. When the defendant agreed to insure the plaintiff's house for the sum of RM600,000 it could not have been the intention of the parties that the house must have been razed to the ground leaving no structure standing before the insured is entitled to the insured sum.

[12] In the context of destruction by fire and in the absence of definition in the insurance policy, "total loss" means the house ceases to exist as a house. Its character has changed to that of another and different character. A completely burnt house cannot properly be called a house. It is a remnant of the house. Where there is complete destruction, I do not see the need for expert opinion to determine if the loss is total. That should be plain to the naked eye. In this regard I accept the plaintiff's evidence that the house was completely burnt and had become unfit for human habitation. The defendant did not produce any evidence in rebuttal. I do not think the defendant can now dispute this fact.

[13] At the trial the defendant sought to produce the Preliminary and Final Reports of the adjusters out of time but upon objection by the plaintiff the reports were ruled out. In the circumstances there is no material before the court to support the defendant's pleaded defence that the destruction by fire to the house did not result in total loss but merely partial loss.

[14] Counsel for the defendant in her submissions attacked the credibility of the plaintiff as a witness, describing her as "unreliable, unstable and evasive" and had a poor memory of most of the events that took place after the fire. I do not think that is a fair assessment of PW1 as a witness. My impression of PW1 is that she is a simple and straightforward witness, a typical kampong folk. If she was "unstable" in her testimony it is not because she was being evasive or dishonest but more due to her simple nature. It is true that she had a poor memory of what took place after the fire but then who would, 15 years after the event?

[15] It was further argued that there is no evidence that the value of the property was RM600,000. With due respect to counsel, the value of the house is totally irrelevant to the issue. The issue is whether the defendant is liable to pay the agreed insured sum.

[16] For reasons aforesaid I find that the plaintiff's claim has been proved on the balance of probabilities.